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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

Nos. 433-434

DAVID RINES, ADMINISTRATOR OF THE ESTATE OF LUCY L. RINES,

Appellant,

vs.

THE HONORABLE JUSTICES OF THE SUPERIOR COURT

APPEALS FROM THE SUPREME COURT OF THE COMMONWEALTH OF MASSACHUSETTS

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, David Rines, Administrator of the Estate of Lucy L. Rines, the petitioner-appellant, submits herewith his statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final rescript or judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts entered in this cause.

Opinions Below

This case originated in the said Supreme Judicial Court as one of two petitions, later numbered 11,261 and 11,262, for writs of certiorari and mandamus, in which the appellant was the petitioner, and The Honorable Justices of the Superior Court were the respondents. Though the petitioner originally endeavored, in his allegations in the respective petitions, to maintain a line of separation between them, that line of separation has since become lost, for the two petitions were argued together, as a unit, in the said Supreme Judicial Court, with the allegations of each petition regarded as applicable also to the other petition, and the two cases were accordingly treated in a single opinion, reported in the Advance Sheets, Opinions of the Supreme Judicial Court, 1953, pages 645-650. A copy of this opinion is attached hereto as Appendix A.

On October 10, 1952, the Supreme Judicial Court of the Commonwealth of Massachusetts delivered identical, very brief, unreported opinions in two companion cases Nos. 11,207 and 11,208, as follows:

> No. 11,207, David Rines, Administrator of the Estate of Lucy L. Rines, Petition to Establish The Truth of Exceptions in the Suit in the Superior Court of the said Commonwealth, No. 42024, David Rines, Administrator of the Estate of *Lucy L. Rines* v. *Armin Klein;*
>
> No. 11,208, David Rines, Administrator of the Estate of Lucy L. Rines, Petition To Establish the Truth of Exceptions in the suit in the Superior Court of the said Commonwealth, No. 42028, David Rines, Administrator of the Estate of *Lucy L. Rines* v. *Reuben B. Davidoff.*

The said identical unreported opinions in the said two further cases Nos. 11,207 and 11,208 read as follows:

> After hearing, petition dismissed on ground the exceptions do not appear meritorious.

The petitioner will in due course file a motion in this Court for an order permitting him to supplement the record of the above-entitled suit by adding thereto certified copies of the records in the Supreme Judicial Court of the Commonwealth of Massachusetts in the said two cases.

Jurisdiction

The rescript or judgment of the said Supreme Judicial Court was entered in each of the said two cases, Nos. 11,261 and 11,262, on July 3, 1953. Petitions for rehearing were presented promptly to the Chief Justice, and were considered by the full Court of the said Supreme Judicial Court, after which they were denied. Adhering to its usual practice, the said Supreme Judicial Court did not make of record either the petitions for rehearing or the action taken thereon. Petitions for appeal in each of the said two cases, Nos. 11,261 and 11,262 are presented to the said Chief Justice herewith, to wit, on September 19, 1953.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2).

The State Statutes the Validity of Which Is Involved

This appeal involves the validity, as applied in this case, of three state statutes, Chapter 231, Sections 111, 113 and 127 of the General Laws of the Commonwealth of Massachusetts, Tercentenary Edition. Together with a fourth statute, Chapter 231, Section 117 of the said General Laws, they are quoted in Appendix B.

The Nature of the Case, the Rulings Which Give Jurisdiction and the Manner in Which the Federal Questions Sought to Be Reviewed Were Raised.

The appeal is from a refusal of the Supreme Judicial Court of the Commonwealth of Massachusetts to confine the

Superior Court of the said Commonwealth to its proper jurisdictional sphere. The controversy arose under the following circumstances.

The petitioner-appellant is the plaintiff in the following two (and additional) suits in the Superior Court of the Commonwealth of Massachusetts:

> No. 42024, David Rines, Administrator of the Estate of *Lucy L. Rines* v. *Armin Klein.*
>
> No. 42028, David Rines, Administrator of the Estate of *Lucy L. Rines* v. *Reuben B. Davidoff.*

After consolidation for trial, the suits were tried to a jury, which awarded the appellant damages. The presiding judge of the Superior Court thereupon set the jury's verdicts aside, and entered verdicts for the defendants. This finally disposed of the said two suits in the Superior Court, the appellant's property rights in the jury's verdicts became vested, as set forth in a consolidated bill of exceptions, and the jurisdiction of the Superior Court over these two suits became terminated, except for its duty either to allow or disallow the consolidated bill of exceptions.

The presiding judge refused, however, to perform this duty thereby preventing the appellant from obtaining a review, in the Supreme Judicial Court, of the proceedings in the Superior Court; and, on October 3, 1951, three and one-half years after the said two suits had been finally disposed of by the directed verdicts, purporting to act under the authority of one of the said three state statutes, Chapter 231, Section 127, he ordered new trials in the said two suits. The appellant has alleged, and the demurrers admit, that, in ordering the new trials, the presiding judge was motivated by bias and prejudice. He therefore issued the orders for new trials pursuant to a secret hearing, held without notice, in a locked private room of the court house, from which not only the public, but also the appellant him-

self, were excluded, without affording the appellant an opportunity to present evidence or to be heard, and without even setting aside the directed verdicts. The said two suits are therefore finally terminated, by reason of the directed verdicts, and also they are still pending, by reason of the orders for new trial.

The appellant excepted to the orders for new trial under the provisions of another of the said three state statutes, Chapter 231, Section 113. The said presiding judge disallowed the bills of exceptions to the orders for new trial, however, holding, in part, that they are not "proper" bills of exceptions.

The petitioner thereupon filed, in the Supreme Judicial Court, under the provisions of the said fourth state statute, Chapter 231, Section 117, the before-mentioned two Petitions To Establish The Truth of Exceptions, Nos. 11,207 and 11,208. These petitions, however, as before stated, were dismissed, in the Supreme Judicial Court.

The first federal question, that relating to the repugnancy of the state statute, Chapter 231, Section 127, to the Fourteenth Amendment, was raised in the said petitions, Nos. 11,261 and 11,262, for writs of certiorari and mandamus, filed in the Supreme Judicial Court. These petitions were heard, in the first instance, by a single justice of the Supreme Court, who sustained demurrers thereto. Though the single justice did not deliver any opinion, the reason for his sustaining the demurrers appears clearly from the record in the mandamus case, No. 11,262. Of the eight grounds of demurrer in this case, the single justice sustained the demurrer upon the first ground only, reading as follows:

1. That the said petition does not set forth any matter or cause whatsoever entitling the petitioner to relief against the respondents, Justices of the Superior Court.

The single justice refused to sustain the demurrer upon any of the seven remaining grounds, including the following fourth ground:

4. Mandamus cannot be granted since the petitioner has another effectual remedy available.

The rulings of the single justice, therefore, were to the effect that the question of the jurisdiction of the Superior Court, under the provisions of the said statute, Chapter 231, Section 127, to order the new trials could properly be tested on petition for a writ of mandamus, and also that, when so applied as to authorize the said orders for new trial, the said state statute, Chapter 231, Section 127, is not repugnant to the due-process clause of the Fourteenth Amendment. The single justice thus ruled adversely to the appellant with respect to the first federal question.

The petitioner excepted to the action of the single justice sustaining the demurrers in the said two suits. It is these exceptions that the Full Court of the Supreme Judicial Court overruled in its said decision of July 3, 1953.

This decision of the Full Court, however, is directly contrary to that of the single justice.

In the first place, the Full Court has declined to affirm the decision of the single justice sustaining the demurrer upon the said first ground quoted above. From this it follows that the Full Court has therefore refused to agree with the holding of the single justice that the said statute, Chapter 231, Section 127, as applied by the Superior Court, when ordering the new trials, is not repugnant to the due-process clause of the Fourteenth Amendment.

The Full Court has also, however, refused to disagree with that holding of the single justice. It has ruled, instead, that the appellant should not be given any answer whatever to his first federal question.

Secondly, therefore, the Full Court has also reversed the action of the single justice in refusing to sustain the demurrer upon the basis of the fourth ground, quoted above.

The Full Court has gone further, however, and stated what is the "effectual remedy available" to the appellant, as alleged under that fourth ground. It is two-fold. First, that the appellant's contentions could have been raised and presented to this Court by exceptions taken and properly followed up in due course under the provisions of G. L. (Ter. Ed.) c. 231, s. 113, as amended by St. 1945, c. 328; and secondly, that the appellant might have requested the trial judge to exercise his discretion to that end by reporting the action taken by him under G. L. (Ter. Ed.) c. 231, s. 111.

This decision of the Full Court came to the appellant as a complete surprise. In the first place, the appellant not only "could have", but did actually, raise his contentions by bills of exceptions, under the provisions of the said state statute, Chapter 231, section 113; and secondly, he did request the trial judge to report the case under the provisions of the said state statute, Chapter 231, section 111.

The appellant's bills of exceptions, as before stated however, were disapproved by the presiding judge as not "proper", within the meaning of the said state statute, Chapter 231, section 113, and the appellant's Petitions To Establish the Truth of Exceptions, Nos. 11,207 and 11,208 were summarily dismissed by the Supreme Judicial Court. The Supreme Judicial Court had therefore held, in those cases, Nos. 11,207 and 11,208, that the appellant could not raise, by exceptions under the provisions of the said state statute, Chapter 231, section 113, the contentions that, in the said decision of July 3, 1953, it later said "could have been raised."

And the presiding judge, admittedly biased and prejudiced had refused and ignored the appellant's requests

for a report under the provisions of the said state statute, Chapter 231, section 111.

The appellant has therefore been driven out of court without being able to obtain even a hearing (except before the single justice, whose decision the Full Court had overturned) upon his contention, that purportedly under the provisions of the state statute, Chapter 231, section 127, he has been deprived of his property, vested in him by the jury's verdicts in violation of the due-process clause of the Fourteenth Amendment of the Constitution of the United States; from which it follows that, as applied by the Supreme Judicial Court, the two statutes, Chapter 231, sections 111 and 113 of the said General Laws are themselves repugnant to the due-process clause of the Fourteenth Amendment.

Since the Supreme Judicial Court was apparently unaware of these facts, the appellant presented them to the Chief Justice in petitions for rehearing. The Full Court considered the petitions for rehearing and denied them. Though, under the practice in the Supreme Judicial Court, neither the petitions for rehearing, nor the action taken thereon are of record, this denial constituted a holding, that, as applied, the state statutes, Chapter 231, sections 111 and 113, are not repugnant to the due-process clause of the Fourteenth Amendment. The appellant has also set forth the repugnancy of the three state statutes, Chapter 231, sections 111, 113 and 127, to the due-process clause of the Fourteenth Amendment, in the Assignment of Errors accompanying his petition for appeal, *Johnson* v. *New York Life Insurance Company*, 187 U.S. 491, 495, *Saunders* v. *Shaw*, 244 U.S. 317, 320, *Herndon* v. *Georgia*, 295 U.S. 441, 443-444; see also Justice Cardozo's dissenting opinion page 447.

The following additional decisions sustain the jurisdic-

tion of the Supreme Court to review the rescript or judgment on direct appeal in this case:

With respect to the repugnancy of a state statute, as applied, to the Constitution of the United States:

Dahnke-Walker Milling Company v. *Bondurant*, 257 U.S. 282, 290.

Richfield Oil Corp. v. *State Board of Equalization*, 329 U.S. 69, 86.

Illinois ex rel. McCollum v. *Board of Education of School District No. 71, Champaign County, Illinois*, 333 U.S. 203, 206.

With respect to the refusal of a state court to decide the question of such repugnancy constituting an equivalent of a holding that the state statute is not so repugnant:

Lawrence v. *State Tax Commission of Mississippi*, 286 U.S. 276, 282.

With respect to the finality of the decision of Supreme Judicial Court:

Hartman v. *Greenhow*, 102 U.S. 672, 675.

Detroit and Mackinac Railway Company v. *Michigan Railroad Commission*, 240 U.S. 564, 571.

Questions Presented

One. After the Superior Court has set aside the verdicts of a jury for the appellant in two suits (Nos. 42024 and 42025) and has directed verdicts for the defendants, thus finally terminating those two suits and losing further jurisdiction thereover except for its duty either to allow or disallow the plaintiff's consolidated bill of exceptions, may the Superior Court, consistent with the due-process clause of the Fourteenth Amendment, though purporting

to act under the provisions of a state statute (G.L. c. 231, § 127, Ter. Ed.), order new trials in the said two suits?

Two. May those orders for new trial, though purporting to be authorized by the said state statute (G.L. c. 231, § 127, Ter. Ed.), be issued, consistent with due process, pursuant to a secret hearing, held without notice, in a locked private room, of the court house, from which not only the public, but also even the petitioner himself, though both a party and an attorney of record in the said suits was deliberately excluded by a judge of the Superior Court who is admitted by demurrer to be biased and prejudiced?

Three. Is it consistent with the prerequisites of judicial determination of facts in accordance with the standards of due process to order new trials, though purportedly authorized by the said state statute (G.L. c. 231, § 127, Ter. Ed.), upon the basis of holdings by a biased and prejudiced judge that are unsupported by evidence, and without affording the appellant an opportunity to present evidence or to be heard?

Refusing to answer any of these three questions, the Supreme Judicial Court has held that the appellant's remedy is not to seek certiorari or mandamus, but, rather, by way of bills of exceptions to the orders for new trial, under the provisions of another state statute (G.L. c. 231, s. 113, Ter. Ed.), and by way of a report of the judge of the Superior Court, under the provisions of a further state statute (G.L. c. 231, s. 111, Ter. Ed.)

Four. In view of the fact that, as appears from the said cases, Nos. 11,207 and 11,208, Petitions to Establish the Truth of Exceptions, the appellant has actually filed such bills of exceptions to the orders for new trial, which petitions, however, the Supreme Judicial Court has summarily dismissed, is that other state statute (G.L. c. 231, § 113, Ter. Ed.) as so applied by the Supreme Judicial Court repug-

nant to the due-process clause of the Fourteenth Amendment?

Five. In view of the fact that the admittedly biased and prejudiced judge of the Superior Court refuses to report the cases to the Supreme Judicial Court, is the further state statute (G.L. c. 231, s. 111, Ter. Ed.), as so applied, repugnant to the due-process clause of the Fourteenth Amendment?

The Questions Involved Are Substantial

The questions involved in this case are just as important as those that were involved in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579. Our liberties will be no more safe if the judiciary should be allowed to exceed its jurisdictional powers than if the President of the United States should be allowed to seize the steel plants.

If this situation had arisen in the federal courts, the appellant's vested property rights would have been restored to him forthwith, *ex parte Simons*, 247 U.S. 231, *ex parte Skinner & Eddy Corporation*, 265 U.S. 86.

A litigant who is compelled to submit to the caprice of a biased and prejudiced judge is denied due process, *Tumey* v. *Ohio*, 273 U.S. 510, 522-523, 535. See also the concurring opinion of Mr. Justice Brandeis in *St. Joseph Stock Yards Co.* v. *United States*, 298 U.S. 38, 73. Even an unbiased judge is required to permit a litigant to present evidence, and to be heard, *Brinkerhoff-Faris Trust and Savings Company* v. *Hill*, 281 U.S. 673, 678, 682, *Shelley* v. *Kraemer*, 334 U.S. 1, 16.

Conclusion

The validity of three statutes, not merely one, as applied by both the Superior Court and the Supreme Judicial Court of the Commonwealth of Massachusetts has been drawn into

question on the ground of their being repugnant to the due-process clause of the Fourteenth Amendment. The questions involved are of real substance and great importance.

It is therefore respectfully submitted that the Supreme Court of the United States has jurisdiction of this appeal.

Respectfully submitted,

DAVID RINES,
Counsel for Appellant.

RINES AND RINES,
Of Counsel.

APPENDIX "A"

OPINION OF THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS—July 3rd, 1953

DAVID RINES, administrator, *vs.* JUSTICES OF THE SUPERIOR COURT

(and a companion case [1])

Suffolk. April 6, 1953.—July 3, 1953

Present: QUA, C. J., LUMMUS, WILKINS, & COUNIHAN, JJ.

Certiorari. Mandamus. Practice, Civil, Review of interlocutory action, New trial. *Supreme Judicial Court,* Review of interlocutory action.

Cases heard in the Supreme Judicial Court for the county of Suffolk by *Williams,* J., on demurrer.

QUA, C. J. The first case is a petition in this court for a writ of certiorari to "vacate, set aside and annul" an order for a new trial entered in the Superior Court on October 3, 1951, in each of two actions of tort there pending and numbered respectively 42024 and 42028. The second case is a petition in this court for a writ of mandamus directing the respondent justices to "vacate, set aside and annul" the same orders for new trial. After the sustaining of demurrers by the single justice the cases are before the full court on the petitioner's bills of exceptions.

The substance of the material allegations of the petition in the first case is that the petitioner, as administrator of the estate of his deceased wife, brought each of the two actions of tort against a physician for alleged malpractice causing personal injury to the plaintiff's wife and bringing about her death; that the two tort actions were tried together; that the trial consumed approximately three and one half weeks and resulted in verdicts for the plaintiff in No. 42024 of $2,000 on the count for death and of $6,000 on the count for personal injury and in No. 42028 of $2,000 on

[1] The companion case is brought by the same petitioner against the same respondents.

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the count for death and of $5,000 on the count for personal injury, the trial judge reserving leave to enter verdicts for the defendants; that thereafter the defendant in each of the tort cases moved for the entry of verdicts in his favor under the leave reserved and also moved for a new trial on each of said counts on the usual grounds; that thereupon, on February 27, 1948, the judge set aside the verdicts for the plaintiff in each action, and in No. 42024 he entered a verdict for the defendant on the count for death and "took no further formal action" as to that count, but denied the defendant's motion for entry of a verdict in his favor on the count for personal injury and granted the defendant's motion for new trial on that count, and in No. 42028 he entered a verdict for the defendant on both the count for death and the count for personal injury and "took no further formal action" as to those counts on the motion for new trial; that the plaintiff then took steps extending over a period of more than three years to prepare successive drafts of a consolidated bill of exceptions for both actions, the latest draft of which was presented to the judge on June 5, 1951, but was never allowed; and that finally on October 3, 1951, the judge "issued orders for new trial" on the death count in No. 42024 and on both counts in No. 42028, these being the counts on which he had previously entered verdicts for the defendants under leave reserved. It is alleged that the judge gave as his reasons for granting new trial that he was entirely satisfied that a medical witness who had been called by the plaintiff "did not have the surgical experience which he testified he did have; that he was not qualified to give expert opinion testimony in these cases; that . . . [the judge's] ruling permitting him to testify was a mistake; that this mistake was the substantial, if not the sole factor in producing verdicts for the plaintiff . . . ; that these verdicts represent a miscarriage of justice"; and that he "therefore" ordered new trials on the specified counts on the ground that the verdicts were "against the weight of the evidence."

The gist of the petitioner's grievance is that the judge finally, after more than three years, granted a new trial upon the same counts upon which he had previously entered

verdicts for the defendants under leave reserved, without the filing by the defendants of any new motions for new trial; that by entering the verdicts on these counts the judge had "automatically" by implication denied the defendants' motions for new trial as to such counts and could not subsequently allow a new trial upon them on the same motions. There are further allegations that need not be stated in detail in which the petitioner asserts, or upon which he bases contentions that all parties in the tort actions and their counsel understood that no further action was to be taken on the motions for new trial as to those counts; that by "accepting the directed verdicts in their behalf, under leave reserved," and by taking part in the subsequent proceedings relative to the plaintiff's exceptions the defendants "had acquiesced" in the "automatic" denials of their motions as to those counts and to that extent had waived their motions and became estopped to seek further action upon them; that the new trial was granted without hearing [2] and for a reason not stated in the motions for new trial; that the original action of the judge in entering the verdicts on the counts in question was res judicata as to those counts; that the orders of October 3, 1951, for a new trial deprive the petitioner of his constitutional and vested rights; that in reliance upon the judge's original action the petitioner had waived his count for personal injury in No. 42024; that he had been put to expense and labor in connection with his bills of exceptions in the tort actions; and that as matters now stand he can get no relief without first trying the tort actions over again in accordance with the judge's orders.

The allegations in the second case are in general similar but with added allegations as to bias and prejudice of the judge and lack of a sufficient hearing before the granting of a new trial by the orders of October 3, 1951. It is not necessary to state these allegations in detail.

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[2] It is stated, however, in the petitioner's reply brief in the first case that there was a hearing on these motions in 1948. His grievance seems to be that he personally was in effect excluded from a second or renewed hearing in 1951, which he also contends was held on inadequate notice, although his counsel was present.

From the foregoing summary of the allegations of the petitions it is apparent that every alleged error complained of and every contention made could have been raised and presented to this court by exceptions taken and properly followed up in due course under the provisions of G. L. (Ter. Ed.) c. 231, § 113, as amended by St. 1945, c. 328. It would be hard to find any principle more fully established in our practice than the principle that neither mandamus nor certiorari is to be used as a substitute for ordinary appellate procedure or used at any time when there is another adequate remedy. Some of the cases are collected in the footnote.[3] See also *Kevorkian* v. *Superior Court*, 295 Mass. 355. It cannot be held that the usual remedy by bill of exceptions is not adequate, even though it may require a new trial, as not infrequently it does. These propositions have been so long in force and acted upon so unvaryingly in this Commonwealth that it would take an extreme case indeed to induce us to depart from them, even

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[3] *Savage* v. *Gulliver*, 4 Mass. 171. *Selectmen of Gardner* v. *Templeton Street Railway*, 184 Mass. 294, 297-298. *Attorney General* v. *New York, New Haven & Hartford Railroad*, 197 Mass. 194, 199. *Crocker* v. *Justices of the Superior Court*, 208 Mass. 162, 164. *Casey* v. *Justice of the Superior Court*, 229 Mass. 200, 201. *Daly* v. *Mayor of Medford*, 241 Mass. 336, 339. *Cambridge Savings Bank* v. *Clerk of Courts*, 243 Mass. 424, 427-428. *Mayor of Medford* v. *Judge of First District Court of Eastern Middlesex*, 249 Mass. 465, 468. *County Commissioners of Essex* v. *Mayor of Newburyport*, 252 Mass. 407. *McLaughlin* v. *Mayor of Cambridge*, 253 Mass. 193, 199. *Peckham* v. *Mayor of Fall River*, 253 Mass. 590, 592. *Bradley* v. *Zoning Adjustment Board of Boston*, 255 Mass. 160, 163. *Bushell* v. *Mayor of Malden*, 260 Mass. 476. *Prusik* v. *Board of Appeal of Boston*, 262 Mass. 451, 453. *Godfrey* v. *Building Commissioner of Boston*, 263 Mass. 589, 592-593. *Whitney* v. *Judge of District Court of Northern Berkshire*, 271 Mass. 448, 458-459. *Maher* v. *Commonwealth*, 291 Mass. 343, 345-346. *Amory* v. *Assessors of Boston*, 306 Mass. 354, 357-358. *Dube* v. *Mayor of Fall River*, 308 Mass. 12, 14. *Jordan Marsh Co.* v. *Labor Relations Commission*, 312 Mass. 597, 599. *Worcester Gas Light Co.* v. *Water Commissioners of the Woodland Water District of Auburn*, 314 Mass. 60, 62-63. *Seney* v. *Board of Health of Northampton*, 314 Mass. 272, 273. *Parrotta* v. *Hederson*, 315 Mass. 416, 420-421. *Tracht* v. *County Commissioners of Worcester*, 318 Mass. 681, 686. *Flynn* v. *Board of Registration in Optometry*, 320 Mass. 29, 30. *Administrator of the Office of Price Administration* v. *Chook*, 320 Mass. 187, 192. *Howe* v. *Attorney General*, 325 Mass. 268, 270.

though the petitioner has succeeded in finding a number of decisions in other jurisdictions in which the practice apparently differs from ours and in which one of the extraordinary writs was employed for a purpose somewhat similar to that for which the petitioner seeks to employ those writs in these cases. See, for example, *Ex parte Simons*, 247 U. S. 231; *Ex parte Skinner & Eddy Corp.* 265 U. S. 86; *S. M. Hamilton Coal Co.* v. *Watts*, 232 Fed. 832; *Quevedo* v. *Superior Court*, 131 Cal. App. 698.

We think it not necessary to consider the further question whether certiorari is ever available where the proceedings in the court below are "according to the course of the common law." See G. L. (Ter. Ed.) c. 249, § 4, as appearing in St. 1943, c. 374, § 1; *Parks* v. *Mayor & Aldermen of Boston*, 8 Pick. 218, 227; *Mendon* v. *County Commissioners of Worcester*, 5 Allen, 13, 15; *Farmington River Water Power Co.* v. *County Commissioners*, 112 Mass. 206, 212; *Tewksbury* v. *County Commissioners of Middlesex*, 117 Mass. 563, 564; *Lynch* v. *Crosby*, 134 Mass. 313; *Fino* v. *Municipal Court of the City of Boston*, 326 Mass. 277, 280; *Butman* v. *Fence Viewers of Chelsea*, 327 Mass. 386. Neither need we consider the general rule, which may be subject to qualification, that mandamus is a remedy for inaction and not available where action has already been taken. *Howe* v. *Attorney General*, 325 Mass. 268, 270.

In these cases apparently the petitioner prefers to have the verdicts which the judge entered against him stand, subject to such exceptions as he may have preserved, rather than to take his chance on a new trial. It is possible to understand this preference. But the petitioner's position is inconsistent with another principle, also of general application in this Commonwealth, that this court cannot be required to deal with cases in interlocutory stages, except where the trial judge has exercised his discretion to that end by reporting the action taken by him under G. L. (Ter. Ed.) c. 231, § 111, or in equity under G. L. (Ter. Ed.) c. 214, § 30. Those sections are designed to furnish a means for immediate review by this court of interlocutory action where justice requires such review. In the absence of a report by the trial judge the proper course is to proceed

in accordance with his orders until the case is ready for final disposition. *Weil* v. *Boston Elevated Railway*, 216 Mass. 545. *Anti* v. *Boston Elevated Railway*, 247 Mass. 1, *Macchiaroli* v. *Howell*, 294 Mass. 144. *John Gilbert Jr. Co.* v. *C. M. Fauci Co.* 309 Mass. 271, 273. See *Gulesian* v. *Richardson*, 306 Mass. 184, 186-187. The cases before us present no special circumstances adequate to take them out of the general rule. The fact that a new trial must be had imposes no greater hardship than is incurred in carrying out many kinds of interlocutory orders. It is not even certain that decisions by us now in favor of the petitioner in the cases before us would end the tort cases, since if we understand the petitioner correctly, he claims still to have exceptions pending in those cases wherein he attacks the verdicts entered by the judge on leave reserved.

There is nothing in *Mengel* v. *Justices of the Superior Court*, 313 Mass. 238, inconsistent with what is here said. In that case the petitioners had an absolute statutory right to an immediate preliminary determination by a single justice of this court of the matter of a temporary injunction in a labor dispute. That right would have been forever lost to them if relief had not been given before the main suit could be heard in the Superior Court.

In each case the entry will be

Exceptions overruled.

David Rines & Robert H. Rines, for the petitioner.

Harris A. Reynolds, Assistant Attorney General,(Joseph H. Elcock, Jr., Assistant Attorney General, with him,) for the respondents.

APPENDIX "B"

STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS IN QUESTION, GENERAL LAWS, TERCENTENARY EDITION

Chapter 231, section 111, Vol. II, page 2876

"A justice of the supreme judicial, the superior or the land court, after verdict, or after a finding of the facts by the court, may report the case for determination by the full court. If a justice of the supreme judicial or the su-

perior court is of opinion that an interlocutory finding or order made by him ought to be determined by the full court before any further proceedings in the trial court, he may report the case for that purpose and stay all further proceedings except such as are necessary to preserve the rights of the parties. A justice of the supreme judicial or the superior court may, upon request of the parties, in any case where there is agreement as to all the material facts, report the case to the full court for determination without making any decision thereon."

Chapter 231, section 113, as amended by St. 1945, c. 328, Vol. II page 2876

"Exceptions may be alleged by any party aggrieved by an opinion, ruling, direction or judgment of the supreme judicial court, of the superior court, or of the land court, rendered upon any matter of law in any civil cause, according to the course of the common law or otherwise, tried by a jury or heard by the court, or upon a motion for a new trial. The exceptions shall be reduced to writing in a summary manner and filed with the clerk, and notice thereof shall be given to the adverse party, in civil cases tried by a jury, within twenty days after the verdict is rendered, and in cases tried without a jury, within twenty days after the notice of the decision has been received, unless further time is allowed by the court. The presiding justice shall thereafter, upon their presentation to him by any party to the action, examine the exceptions, and after hearing the parties, determine whether they are conformable to the truth. The excepting party may be allowed to make such amendments to his bill of exceptions as will make it a more accurate statement of the exceptions originally filed by him. If the presiding justice finds that the exceptions, with any amendments thereof thus allowed, are conformable to the truth, he shall allow them. The presiding justice may, if, in his opinion, a bill of exceptions is filed in good faith, and justice so requires, allow such bill of exceptions although the expecting party or his attorney failed, through inadvertence, to comply with all of the provisions of this section. If, through inadvertence, a party who has duly

claimed exceptions failed to file a bill of exceptions within said twenty days or within such further time as may have been allowed, the presiding justice may, before final judgment, upon motion after notice and hearing, allow a bill of exceptions to be filed and may allow such bill of exceptions."

Chapter 231, section 117, Vol. II, page 2878

"If the presiding justice, or another justice acting under section one hundred and fifteen, disallows or fails to sign and return the exceptions or alters any statement therein, and either party is aggrieved thereby, the truth of the exceptions presented may be established before the full court upon petition stating the grievance, and thereupon, the truth of the exceptions being established, they shall be heard, and the same proceedings taken, as if the exceptions had been duly allowed and entered. The supreme judicial court shall make rules for settling the truth of exceptions alleged and not allowed."

Chapter 231, section 127, Vol. II, page 2881

"The court may, at any time before judgment, set aside the verdict in a civil action and order a new trial for any cause for which a new trial may by law be granted; but a verdict shall not be set aside except on written motion by a party to the cause, stating the reasons relied upon in its support, filed and heard after notice to the adverse party according to the rules of the court. A verdict shall not be set aside as excessive until the prevailing party has first been given an opportunity to remit so much thereof as the court adjudges is excessive. A verdict shall not be set aside solely on the ground that the damages are inadequate until the parties have first been given an opportunity to accept an addition to the verdict of such amount as the court adjudges reasonable."